
Costs Decision

Site visit made on 2 December 2021

by David Spencer BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 7th January 2022

Costs application in relation to Appeal Ref: APP/C3810/W/21/3273087 Land south of Barnham Station, Barnham, West Sussex.

- The application is made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by Gleeson Strategic Land for a full award of costs against Arun District Council.
 - The appeal was against the refusal of planning permission for an outline planning application with all matters reserved other than principal means of access for up to 200 dwellings, with access taken from Marshall Close, associated infrastructure and demolition of existing buildings.
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Decision

1. The application for an award of costs is allowed in the terms set out below.

Reasons

1. The application for costs seeks a full award on primarily substantive grounds although there is some overlap with procedural matters. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process¹.

Procedural

2. In relation to procedural grounds, the PPG at paragraph 16-047-20140306 advises that the types of behaviour that may give rise to a procedural award of costs against a Local Planning Authority (LPA) include, amongst other things, the withdrawal of any reason for refusal and not agreeing a statement of common ground in a timely matter. In relation to the various reasons for refusal that were withdrawn preceding and during the Inquiry event these relate to technical matters as well as the submission of a Section 106 Agreement containing a number of lawful planning obligations. Various aspects of the appellant's technical evidence, to establish various matters relating to the suitability of the appeal proposal, have taken some time to resolve following the Council's determination of the proposal in February 2021. For example, resolution with the Environment Agency on flood risk matters was not finalised until early August 2021, some months after the appeal was lodged.
3. Generally, I have found the LPA to have responded in a timely and pragmatic manner when a number of technical matters were resolved post-determination.

¹ PPG paragraph 16-030-20140306

The appellant has not incurred any unnecessary or wasted expense in relation to the timing of when those reasons for refusal have been withdrawn.

4. The LPA has entered into statements of common ground as part of the appeal, in terms of an over-arching planning statement and a technical statement on matters of housing land supply. In relation to heritage there appear to be relatively few factual matters or areas of common ground that would have constructively narrowed the appeal process. As such I do not consider the absence of a heritage statement of common ground would amount to unreasonable behaviour in this case.

Substantive

5. The bulk of the appellant's cost application relates to submissions of unreasonable behaviour with respect to the substance of the matter under appeal. The appellant asserts that the LPA has behaved unreasonably by refusing the planning application and subsequently by unreasonably defending the residual reasons for refusal. Having regard to the PPG at paragraph 16-049-20140306 the appellant submits that the unreasonable behaviour on matters of substance mean that a development which should clearly be permitted had been unjustifiably prevented or delayed. In particular the appellant asserts that on remaining reasons for refusal relating to connectivity, foul water and heritage the LPA failed to produce evidence to substantiate these reasons for refusal and relied on vague and generalised assertions about a proposal's impact, which are unsupported by any objective analysis. In relation to foul water, the PPG also advises that refusing planning permission on a ground capable of being dealt with by condition risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead.
6. In relation to connectivity, matters are not straightforward. With regards to Yapton Road I have mainly found the LPAs concerns about the quality and safety of the route for pedestrians to be generalised and not supported by any technical analysis. This is in contrast to the detailed evidence and plans provided by Mr Smith for the appellant. In terms of the LPAs judgement of the quality of the route for pedestrians I have some difficulties given relatively recent approvals for major residential development further east on Yapton Road and the general consistency of approach in the National Planning Policy Framework (NPPF) to assessing attractive and safe connections for all users.
7. On the other hand, there appears to be a degree consensus that traffic volumes on the B2233 will deter some modal shift to cycling, with no scope for mitigation, which lends some justification to the LPAs connectivity concerns. Moreover, one of the key strands of the LPAs position related to wider connectivity and integration, including to the adjacent BEW and alternative non-vehicular links into Barnham other than Yapton Road. The appellant's position on this moved significantly immediately preceding and during the Inquiry hearings, albeit principally in relation to the objections from Network Rail. Consequently, matters are balanced, and whilst I have concluded in the main decision that the appeal site would be well-connected, that has in part been on the basis of imposing an appropriate condition in relation to rail safety. This condition was largely negotiated and finalised during the Inquiry event. As such, and on balance, the LPA has not behaved unreasonably on this matter.

8. In relation to foul water disposal, it is clear that Barnham has experienced significant issues and the LPA has genuine concerns about securing effective solutions. That said, the appellant has submitted a proportionate volume of uncontested technical evidence at the outline stage. The appellant submits that it has undertaken as much capacity checking and technical assessment as it can practicably do so within the scope of available inputs provided by Southern Water. The LPA in its case has not made sufficiently clear what evidence it considers necessary to satisfy 'a full drainage impact assessment' as set out in Part 3 of Policy W DM1 of the Arun Local Plan 2018 and how that could practicably be achieved at an outline stage in light of Southern Water's position² and its exclusivity in using its data to inform a developer of any necessary network reinforcement measures, if required.
9. Initial assessment provided by the appellant shows only very modest additional flows into the receiving sewer network, at a point downstream of existing properties in Barnham and approximately 1km from the Lidsey treatment works. Southern Water have confirmed their obligation to connect under Section 106 of the Water Act 1991 and have outlined a two year timeframe to investigate and implement any required upgrades to the foul water sewer network, with any interim solution being their at responsibility.
10. The LPAs concern about foul water solutions (including any associated permits or licences linked to any drainage work close to the Barnham Rife) delaying completion and occupation of housing units on the appeal site beyond the five year period is a generalised assertion, unsupported by any objective analysis. Ultimately in this appeal, a Grampian style condition (proposed condition No.9) has been found to meet the relevant tests. Such a condition was advised to the LPA in Southern Water's consultation response of 31 December 2020 to the planning application. Ultimately, I remain unclear after considering the LPAs evidence and its response to this costs application why such a condition would not have been suitable in addressing this planning ground (reason for refusal no.5). As such I consider the appellant has been put to unnecessary expense in this appeal in relation to foul water matters, including Mr Abley's participation at the Inquiry.
11. On heritage matters, judgements are necessarily required. The LPAs position in the appeal³ asserts a less than substantial harm on the impact of two listed buildings, which it concludes would be outweighed by public benefits. Whilst the harm to listed buildings was not a reason for refusal and so the LPA has not sought to rely on it, nonetheless, it follows that the LPAs asserted heritage harm to listed buildings⁴ would need to be considered as part of the appeal and inputted by a decision-maker into both a NPPF paragraph 202 heritage balance and any wider (tilted) planning balance. The Council's Conservation Officer advised that there would be no harm to the heritage significance of the listed building assets, including their setting. The Council's evidence and assessment to arrive at an alternative finding involves a judgement based only very limited intervisibility, without any transparent, substantive assessment in either the officer report or the appeal documents. Overall, I find that the appellant has been put to unnecessary and wasted expense as part of this appeal in addressing the Council's asserted harm to listed buildings.

² See Appendix C to Leigh Abley Proof of Evidence, articulated in correspondence from Southern Water dated 31 December 2020 and 13 July 2021

³ KR Proof of Evidence paragraphs 68-72

⁴ LPA Statement of Case paragraph 158

12. Turning to the degree of harm to the heritage significance of the conservation area, in terms of the contribution of the appeal site to its setting, both parties are agreed that the harm would be less than substantial. As set out above, given the respective differences on grading the degree of less than substantial harm I am unsure what benefit a statement of common ground would have yielded. As set out in my decision, I have not shared either parties' assessment of where the harm is likely to sit on a scale of less than substantial, although I have found myself to be closer to the appellant's position. Whilst the LPAs assessment of harm is too pessimistic, I note that the Council's Conservation Officer did not seek to calibrate where they thought the impact would be on the scale of less than substantial. As such it was a matter of judgement for the decision maker and given the perceptible erosion of the rural setting to the north-east of the Conservation Area and the gap between old and modern Barnham, as I have observed on site, I do not consider the LPAs judgement to have been entirely unreasonable. Consequently, I am not persuaded that the appellant has been put to unnecessary or wasted expense in relation to the reason for refusal relating to the Conservation Area and the need to engage a heritage balance in the terms at paragraph 202 of the NPPF.
13. Turning to an over-arching substantive matter, the appellant submits that the Council behaved unreasonably during the determination of the planning application so as to prevent or delay a development which should clearly be permitted. The PPG at paragraph 16-033-20140306 confirms that behaviour and actions at the time of the planning application can be taken into account in considering whether or not costs should be awarded.
14. The appellant further submits that the Council's behaviour on this substantive matter is compounded by the Council's policy in both the 2019 Housing Delivery Test Action Plan and the 2021 Interim Housing Statement to pragmatically consider applications on deliverable sites in the Housing and Employment Land Availability Assessment (HELAA). Given housing land supply situation and scale of unmet housing need, this interim policy, notwithstanding the primacy of the development plan, is a significant material consideration alongside the NPPF and national policy to boost the supply of housing, including the engagement of the tilted balance in favour of sustainable development.
15. In terms of the LPAs behaviour during the pre-application and determination stages of the appellant's proposal, it seems from the evidence before me that the appellant intended an expeditious timeframe such that there was little lag between any limited pre-application dialogue and the submission of the outline application in November 2020. Paragraph 39 of the NPPF highlights the benefits of good quality pre-application discussion, including encouraging early engagement with statutory consultees. In this case, it feels like the application was promptly submitted with the engagement largely to follow. To some extent this is evidenced by the length of the time it has taken the appellant to resolve a number of technical matters.
16. In terms of whether the appeal could have been avoided by the LPA taking more time to determine the application, including in the context of the Council's interim policy to take a pragmatic approach on considering proposal on deliverable HELAA sites, matters are balanced. To some extent the site's identification in the HELAA as 'deliverable' and the Council's interim policy could understandably provide the appellant with some degree of confidence but neither document is a guarantee of planning permission being granted. The

HELAA clearly identifies site-specific constraints. It is not unreasonable on more detailed analysis, in contrast to the broad-brush approach of the HELAA, that these are matters that potentially to give rise to significant harm depending on the particular form and scale of the development proposed. In relation to the conservation area, some aspects of the visual and character impact of the proposal and its proposed connectivity at the time of determination, I find the Council's judgements on these matters to have been clearly articulated, supported by relevant development plan policy and, on balance, reasonable.

17. The application was in outline and notwithstanding the comprehensive Design and Access Statement, it seems evident that considerable time would have been required to ensure that a number of in-principle matters requiring resolution at the outline stage could be acceptably addressed, including by appropriate conditions likely to meet the required tests. The LPA has referred to its requirement to determine major planning applications expeditiously⁵ (preferably within 13 weeks). In light of this and given the number of unresolved matters as of late February 2021, I consider the LPA did not act prematurely or zealously in its determination of the planning application.
18. I appreciate initial pre-application discussion with the original case officer indicated little, if any, in principle objections but the officer who ultimately determined the proposal was not professionally bound to arrive at a similar judgement, when taking into account the further evidence before them, including consultation responses. Having visited the appeal location, and in light of the development plan as a whole, the professional judgements on harm to conservation area, character and appearance and to a lesser extent connectivity are within the bounds of reasonableness. Whilst the officer report, statement of case and proof of evidence contain significant repetition, I found both this evidence and the LPA's witness at the Inquiry to cogently explain the residual reasons for refusal Nos.1 and 10⁶ and in part those for No. 3.
19. The Council has taken a balanced approach in its decision-making and clearly applied reduced weight to the conflict with those policies relevant to the supply of housing. Whilst I share the appellant's concerns regarding the lack of transparency around the weight the LPA gave to various harms and benefits in any balance, this does not indicate the LPAs balancing judgment was unreasonable. As set out separately in my main decision, matters are reasonably balanced in this case, recognising the substantial benefit of new homes, and other benefits, remain to be pitted against the appreciable harm to the conflict with a relatively recent Local Plan and an emerging, but significantly advanced, update to the Neighbourhood Plan together with heritage and local character harms. These are not clear-cut circumstances. In terms of the weight to be given to inputs in the balance, the Council has sought to engage reasonably on matters of housing land supply. Whilst there are shortcomings in the Council's 'deliverability' evidence on a modest number of disputed sites, ultimately given the extent of the shortfall in Arun there is relatively little difference between the appellant and LPA positions. I have found the evidence to be somewhere between the respective positions of the two main parties.

⁵ PPG paragraph 21b-001-20140306

⁶ Insofar as it relates to the setting of the Conservation Area

20. Taking all of this into account I do not find that the LPA has unreasonably prevented or delayed a development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations in the terms expressed at PPG paragraph 16-049-20140306.

Conclusion

21. I therefore find that the LPA has failed to produce sufficient evidence to substantiate its reasons for refusal No. 5 (foul water), which was a ground capable of being appropriately dealt with by condition. Additionally, I have found that the appeal also had to address vague and generalised assertions about the proposal's impact on the setting of Listed Buildings. As such I find that unreasonable behaviour on the part of the Council resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated. Accordingly, I conclude that a partial award of costs is justified.

Costs Order

22. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Arun District Council shall pay to Gleeson Strategic Land the costs of the appeal proceedings described in the heading of this decision but limited to those costs incurred in responding to Reason 5 of the authority's decision and in dealing with the asserted impact on the setting of Listed Buildings, and such costs shall be assessed in the Senior Courts Costs Office if not agreed.
23. Gleeson Strategic Land is now invited to submit to the Council, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

David Spencer

INSPECTOR.